

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 9

IN THE MATTER OF:

WR Grace Phoenix Site

W.R. Grace & Co. – Conn.  
4220 West Glenrosa Avenue  
Phoenix, AZ

W. R. Grace & Co. – Conn.  
Respondent

ADMINISTRATIVE ORDER ON  
CONSENT FOR REMOVAL ACTION

U.S. EPA Region 9  
CERCLA  
Docket No. 2001-24

Proceeding Under Sections 104, 106(a), 107  
and 122 of the Comprehensive  
Environmental Response, Compensation, and  
Liability Act, as amended, 42 U.S.C. §§9604,  
9606(a), 9607 and 9622

**I. JURISDICTION**

This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and W.R. Grace & Co. – Conn. ("Respondent"). This Order provides for the performance of the removal action by Respondent and the reimbursement of response costs incurred by the United States in connection with the property located at 4220 West Glenrosa Avenue, Phoenix, Arizona (the "Site"). This Order requires Respondent to conduct the removal action described herein to abate an imminent and substantial endangerment to the public health, welfare or the environment that may be presented by the actual or threatened release of hazardous substances at or from the Site.

This Order is issued pursuant to the authority vested in the President of the United States by Sections 104, 106(a), 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607, and 9622, as amended ("CERCLA"), and delegated to the Administrator of EPA by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, and further delegated to the EPA Regional Administrators by EPA Delegation Nos. 14-14-A and 14-14-C, to the Director, Superfund Division by EPA Region IX Delegation No. 8-14-13 and to the Region IX Superfund Branch Chiefs by Regional Order 1290.15 on September 29, 1997.

EPA has notified the State of Arizona of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

## **II. GENERAL PROVISIONS**

Respondent's participation in this Order shall not constitute or be construed as an admission of liability in any judicial or administrative proceeding and Respondent's participation herein shall not be construed as an acknowledgment or agreement with EPA's findings, determinations, test methods or standards contained in this Order except in a proceeding to enforce the terms of this Order. Specifically Respondent's participation shall not be construed as an acknowledgment or agreement with EPA's determination that the release(s) or threatened release(s) referred to herein constitutes an imminent and substantial endangerment to the public health or welfare or the environment except in a proceeding to enforce the terms of this Order. Respondent agrees to comply with and be bound by the terms of this Order.

## **III. PARTIES BOUND**

This Order applies to and is binding upon EPA and upon Respondent.

Respondent shall ensure that its contractors and representatives receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

## **IV. FINDINGS OF FACT**

For the purposes of this Order, EPA finds that:

1. W.R. Grace & Co. – Conn., Respondent, is the owner and/or operator of the Site facility located at 4220 West Glenrosa Avenue, Phoenix, Arizona.

2. During Respondent's, or its predecessors in interest, ownership of the Site, the Site facility received vermiculite concentrate from the vermiculite mining facility in Libby, Montana.
3. Vermiculite concentrate from the WR Grace mining facility in Libby, Montana, contained a form of naturally-occurring asbestos called tremolite-actinolite asbestiform mineral fibers.
4. Exposure to asbestos, under certain circumstances, poses a threat to human health. It can cause asbestosis, a restrictive lung disease which can be fatal, lung cancer and a cancer of the lung lining called mesothelioma.
5. John A. Volpe National Transportation Systems Center, Environmental Engineering Division ("Volpe") was tasked by EPA's Emergency Removal and Response Branch (ERRB) to perform a Preliminary Assessment and Site Investigation (PA/SI) at the Site to determine the nature and extent of contamination related to asbestos existing at the Site and document those findings in a Focused Removal Assessment Report (hereinafter Volpe Assessment Report) which was submitted to EPA in July of 2001. The results which are documented in the Volpe Assessment Report for the Site indicate that several media including certain locations at the Site contain asbestos which poses a human health risk.

#### **V. EPA's CONCLUSIONS OF LAW AND DETERMINATIONS**

Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

1. The WR Grace Phoenix Site located at 4220 West Glenrosa Avenue Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
2. The contaminants found at the Site, as identified in the Findings of Fact above, include "hazardous substance(s)" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
3. The Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
4. The Respondent may be liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).
5. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the Site as defined by Sections 101(22) of CERCLA, 42 U.S.C. § 9601(22).
6. The conditions present at the Site constitute an imminent and substantial endangerment to public health, welfare, or the environment. Factors that may be considered are set forth in Section

300.415(b)(2) of the National Oil and Hazardous Substances Pollution Contingency Plan, as amended, 40 CFR Part 300 ("NCP").

7. The actual or threatened release of hazardous substances at or from the Site may present an imminent and substantial endangerment to the public health, welfare, or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

8. The removal actions required by this Order are necessary to protect the public health, welfare, or the environment, and are not, for purposes of this agreement, inconsistent with the NCP or CERCLA.

## **VI. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record for this Site, it is hereby ordered and agreed that Respondent shall comply with the following provisions, including but not limited to all attachments to this Order, and all documents incorporated by reference into this Order, and perform the following actions:

### **1. Designation of Contractor**

Respondent shall perform the removal action required by this Order by retaining an asbestos abatement contractor(s) to perform the removal action. Respondent shall notify EPA of Respondent's qualifications or the name(s) and qualification(s), specifically its certificate or license information, of such contractor(s) within 20 business days of the effective date of this Order. EPA retains the right to disapprove of any, or all, of the contractors retained by the Respondent. If EPA disapproves of a selected contractor or the Respondent, Respondent shall retain a different contractor within 20 business days following EPA's disapproval and shall notify EPA of that contractor's name and qualifications within 20 business days of EPA's disapproval. EPA will disapprove of any contractor which does not have the prerequisite license and/or certificate to conduct asbestos abatement work in accordance with State and Federal asbestos management regulations.

Within 20 days after the effective date of this Order, Respondent shall designate a Project Coordinator who shall be the main point of contact for the work to be performed and be responsible for administration of all the work required by the Order. Respondent shall submit the designated coordinator's name, address, telephone number, and qualifications to EPA. The Project Coordinator may be an employee of the asbestos abatement contractor overseeing the work at the facility. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work.

EPA has designated Bob Mandel of the EPA, Region IX Emergency Response and Removal Branch as its On-Scene Coordinator ("OSC") and Bret Moxley as the OSC Representative. For purposes of this Order and the WR Grace Phoenix Site, the OSC Representative shall have all the powers and authority vested in an OSC as provided in the NCP. Respondent shall direct all submissions required by this Order to the OSC Representative at:

**Bret Moxley**  
U.S. Environmental Protection Agency, Region 9  
Mail Code SFD-6  
75 Hawthorne Street  
San Francisco, California 94105  
415-744-1148  
[Moxley.Bret@epa.gov](mailto:Moxley.Bret@epa.gov)

## **2. Work to Be Performed**

Respondent shall perform, at a minimum, the following removal action:

a. - **Dust Sampling**: Respondent shall sample dust in the Production Area and Office Building in the same general locations and in the same manner as the samples taken in these areas by EPA as identified in the Volpe Assessment Report. Sampling shall be conducted using a combination of two methods: one, "Standard Test Method For Microvacuum Sampling and Indirect Analysis of Dust by Transmission Electron Microscopy for Asbestos Structure Number Concentration" ASTM Designation D 5755-95; and two, "Ambient Air-Determination of Asbestos Fibers - Direct Transfer Transmission Electron Microscopy Method", ISO Method 10312. ASTM Method D 5755-95 will be used to collect the dust samples and prepare the samples for analysis using a Transmission Electron Microscope. The counting rules will be those found in sections 9.5 through 9.7 of the ISO 10312 method. When the fiber/structures count has been completed, the reporting method and formula found in ASTM Method D 5755-95 (see Section 18) will then again be used to determine the number of structures per square centimeter in the dust sample. EPA has elected to use the ISO 10312 Method to count fibers/structures in order to conform to the analytical data base generated in the EPA Region VIII activities in Libby, Montana. Respondent shall notify EPA's OSC of any sampling results at least 72 hours before commencing any HEPA vacuuming of the dust.

b. **Soils**. Respondent shall address soils containing greater than one percent (>1%) asbestos in the vicinity of the railroad tracks, as identified in Figure 4-1 of the Volpe Assessment Report. Respondent shall excavate and remove all soils containing vermiculite in these areas up to a depth of one (1) foot below grade. Respondent shall then backfill the excavated area with clean fill and

cap with concrete or asphalt. Alternatively, Respondent may excavate the above points to a depth of two (2) feet below grade and may then backfill the excavated areas with clean fill.

c. Dust. Respondent shall, using a HEPA vacuum, remove dust in the Maintenance Shop and Silo Pad areas from all upward-facing horizontal surfaces except for the floor. Such work will address shelving, countertops, window sills, wide-flange beams, girders, etc., where dust has accumulated. Respondent's abatement contractor shall take all appropriate precautions to avoid re-suspending such dust into the air. If Respondent's sampling of the Production Area and Office Building indicate further action is necessary to be consistent with the cleanup required within the Maintenance Shop and Silo Pad, Respondent shall perform this HEPA vacuum mitigation in those areas as well.

d. All work performed by the abatement contractor, including the handling and disposal of asbestos contaminated materials, shall be in accordance with applicable State and Federal regulations.

e. Respondent shall initiate abatement work within 30 days after EPA receives the asbestos abatement contractor's name and qualifications. All work described herein shall be completed, at a minimum, within 90 days after EPA receives the asbestos abatement contractor's name and qualifications, unless Respondent received a written extension from EPA's OSC. Respondent's failure to complete the work within this time frame shall subject it to penalties contained in Section XI herein.

f. Final Report

Within 20 days after completion of all removal actions required under this Order, the Respondent, or Respondent's contractor, shall submit to EPA a final report summarizing the actions taken to comply with this Order. The final report shall include a listing of quantities and types of materials removed off-Site or handled on-Site, a listing of the ultimate destination of those materials, a statement that the contractor handled and disposed of all asbestos contaminated materials in accordance with all applicable State and Federal asbestos management practices, a presentation of the analytical results of all sampling and analyses performed (if any), and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

### 3. Access to Property and Information

Respondent shall provide access to the areas to which access is necessary to implement this Order, and provide access to all records and documentation related to the conditions at the Site and the actions conducted pursuant to this Order. Such access shall be provided to EPA employees, contractors, agents, consultants, designees, representatives, and State of Arizona representatives. Respondent shall submit to EPA the results of all sampling or tests and all other data generated by Respondent or their contractor(s), or on the Respondent's behalf during implementation of this Order.

### 4. Record Retention, Documentation, Availability of Information

Respondent shall preserve all documents and information relating to work performed under this Order, or relating to the hazardous substances found on or released from the Site, for three (3) years following completion of the removal actions required by this Order. At the end of this three year-period and 30 days before any document or information is destroyed, Respondent shall notify EPA that such documents and information are available to EPA for inspection, and upon request, shall provide the originals or copies of such documents and information to EPA. In addition, Respondent shall provide documents and information retained under this section at any time before expiration of the three-year period at the written request of EPA.

Respondent may assert a business confidentiality claim pursuant to 40 CFR § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Order, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Respondent.

### 5. Off-Site Shipments

All hazardous substances, pollutants, or contaminants removed off-Site pursuant to this Order for treatment, storage, or disposal shall be treated, stored, or disposed of at a facility in compliance pursuant to Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and the off-site rule at 40 CFR 300.440.

### 6. Compliance With Other Laws

Respondent shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in CERCLA Section 121(e) and 40 CFR Section 300.415(i).

## **7. Emergency Response and Notification of Releases**

If any incident, or change in Site conditions, during the actions conducted pursuant to this Order causes or threatens to cause an additional release of hazardous substances from the Site or an endangerment to the public health, welfare, or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC. If Respondent fails to respond, EPA may respond to the release or endangerment and reserve the right to pursue cost recovery.

In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify EPA's OSC and the National Response Center at telephone number (800) 424-8802. Respondent shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, not in lieu of, reporting under CERCLA Section 103(c) and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11001 et seq.

## **VII. AUTHORITY OF THE EPA ON-SCENE COORDINATOR**

The OSC shall be responsible for overseeing the Respondent's implementation of this Order. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any work required by this Order, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

## **VIII. REIMBURSEMENT OF FUTURE COSTS**

Respondent shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Respondent a bill requiring payment that includes a cost summary. Respondent shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in within this Section of the Order.

Respondent shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making payment and EPA Site/Spill ID number. Respondent shall send the check(s) to:



U.S. Environmental Protection Agency  
Superfund Accounting  
Vermiculite Sites (WR Grace Phoenix Site) Special Account  
P.O. Box 3608  
Pittsburgh, PA 15251

At the time of payment, Respondent shall send notice that payment has been made to: Lisa Hanusiak; US EPA; Mail Code SFD-6; 75 Hawthorne Street; San Francisco, CA 94105-3901.

The total amount to be paid by Respondent pursuant to this Section shall be deposited in the Vermiculite Sites (WR Grace Phoenix Site) Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

The Interest on Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of penalties pursuant to Section XI.

Respondent may dispute all or part of a bill for Future Response Costs submitted under this Order, if Respondent allege that EPA has made an accounting error, or if Respondent allege that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested costs to EPA as specified on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the persons listed above. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within 15 days after the dispute is resolved.

#### **IX. DISPUTE RESOLUTION**

Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The parties to this Order shall attempt to resolve, expeditiously and informally, any disagreements concerning this Order.

If the Respondent objects to any EPA action taken pursuant to this Order, including billings for Future Response Costs, the Respondent shall notify EPA's Assistant Regional Counsel, Thanne

Cox, in writing of its objection(s) at the following address within 10 days of receipt of notice of such action, unless the objection has been informally resolved.

Thanne Cox  
EPA Region 9  
Mail Code ORC3  
75 Hawthorne Street  
San Francisco, California 94105

EPA and Respondent shall within 20 days from EPA's receipt of the Respondent's written objections attempt to resolve the dispute through formal negotiations (Negotiation Period). The Negotiation Period may be extended at the sole discretion of EPA.

Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, Superfund Division Director, Keith Takata, will issue a written decision on the dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondent's obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. No EPA decision made pursuant to this section shall constitute a final agency action giving rise to judicial review prior to a judicial action brought by the United States to enforce the decision.

#### **X. FORCE MAJEURE**

Respondent agrees to perform all requirements under this Order within the time limits established under this Order, unless the performance is delayed by a force majeure. For purposes of this Order, a force majeure is defined as any event arising from causes beyond the control of Respondent or of any entity controlled by Respondent, including but not limited to its contractors and subcontractors, that delays or prevents performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. Force majeure does not include financial inability to complete the work or increased cost of performance.

Respondent shall notify EPA after Respondent becomes or should have become aware of events which constitute a force majeure. Such notice shall: identify the event causing the delay or anticipated delay; estimate the anticipated length of delay, including necessary demobilization and re-mobilization; state the measures taken or to be taken to minimize the delay; and estimate the timetable for implementation of the measures. Respondent shall take all reasonable measures to

avoid and minimize the delay. Failure to comply with the notice provision of this section shall waive any claim of force majeure by the Respondent.

If EPA determines a delay in performance of a requirement under this Order is or was attributable to a force majeure, the time period for performance of that requirement shall be extended as deemed necessary by EPA. Such an extension shall not alter Respondent's obligation to perform or complete other tasks required by the Order which are not directly affected by the force majeure.

## **XI. STIPULATED PENALTIES**

Respondent shall be liable to EPA for stipulated penalties in the amounts set forth herein for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

### **Stipulated Penalty Amounts**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified at (b) below:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 100.00	1st through 14th day
\$ 250.00	15th through 30th day
\$ 500.00	31st day and beyond

b. Respondent shall comply with all requirements identified in Section VI and VIII. Failure to comply which will subject the Respondent to stipulated penalties shall include:

- Failure to designate a contractor per Section VI
- Failure to perform dust sampling per Section VI
- Failure to initiate Abatement Work per Section VI
- Failure to complete the Work required under this Order per Section VI
- Failure to submit a Final Report to EPA per Section VI
- Failure to reimburse EPA per Section VIII

All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1)

with respect to deficient submissions under Section VI (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and 2) with respect to a decision by the EPA Superfund Division Director, under Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA Superfund Division Director issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

Following EPA's determination that Respondent has failed to comply with a requirement of this Order, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation.

All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section IX (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency at the following address:

U.S. Environmental Protection Agency  
Superfund Accounting  
Vermiculite Sites (WR Grace Phoenix Site) Special Account  
P.O. Box 3608  
Pittsburgh, PA 15251

The check shall also indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number, the EPA Docket Number, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to:

Lisa Hanusiak  
U.S. Environmental Protection Agency, Region 9  
Mail Code SFD-6  
75 Hawthorne Street  
San Francisco, California 94105  
415-744-2213  
Hanusiak.Lisa@epa.gov

The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Order.

Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant this Section. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

## **XII. RESERVATION OF RIGHTS**

Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring the Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law. EPA reserves the right to bring an action against Respondent under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any response costs incurred by the United States related to this Order or the Site and not reimbursed by Respondent.

## **XIII. OTHER CLAIMS**

By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. Neither the United States nor EPA shall be deemed a party to any contract entered into by the Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

Except as expressly provided in Section XIV (Covenant Not To Sue), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against the Respondent or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or the common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. §§ 9606(a) and 9607(a).

This Order does not constitute a preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2). The Respondent waives any claim to payment under Sections 106(b), 111, and 112 of CERCLA, 42 U.S.C. §§ 9606(b), 9611, and 9612, against the United States or the Hazardous Substance Superfund arising out of any action performed under this Order.

No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

#### **XIV. COVENANT NOT TO SUE**

Except as otherwise specifically provided in this Order, upon issuance of the EPA notice referred to in Section XX (Notice of Completion), EPA covenants not to sue Respondent for judicial imposition of damages or civil penalties or to take administrative action against Respondent for any failure to perform removal actions agreed to in this Order except as otherwise reserved herein.

These covenants not to sue are conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Order. These covenants not to sue extend only to the Respondent and do not extend to any other person.

#### **XV. CONTRIBUTION PROTECTION**

With regard to claims for contribution against Respondent for matters addressed in this Order, the Parties hereto agree that the Respondent is entitled to protection from contribution actions or claims to the extent provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4). Nothing in this Order precludes the United States or the Respondent from asserting any claims, causes of action or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

#### **XVI. INDEMNIFICATION**

Respondent agrees to indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action: (A) arising from, or on account of, acts or omissions of Respondent, Respondent's officers, heirs, directors, employees, agents, contractors, subcontractors, receivers, trustees, successors or

assigns, in carrying out actions pursuant to this Order; and (B) for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between (any one or more of) Respondent, and any persons for performance of work on or relating to the Site, including claims on account of construction delays. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including litigation costs arising from or on account of claims made against the United States based on any of the acts or omissions referred to in the preceding paragraph.

#### **XIX. MODIFICATIONS**

Modifications to any plan or schedule or Statement of Work may be made in writing by the OSC or at the OSC's oral direction. If the OSC makes an oral modification, it will be memorialized in writing within 5 days; provided, however, that the effective date of the modification shall be the date of the OSC's oral direction. Any other requirements of the Order may be modified in writing by mutual agreement of the parties.

#### **XX. NOTICE OF COMPLETION**

When EPA determines, after EPA's review of the Final Report, that all removal actions have been fully performed in accordance with this Order, EPA will provide notice to the Respondent. If EPA determines that any removal actions have not been completed in accordance with this Order, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent correct such deficiencies. Respondent shall implement the required work and submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified work shall be a violation of this Order.

#### **XXI. SEVERABILITY**

If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

#### **XXIV. EFFECTIVE DATE**

This Order shall be effective 5 days after the Order is signed by the Superfund Division Branch Chief of EPA Region IX.

The undersigned representative of Respondent certifies that it is fully authorized to enter into the terms and conditions of this Order and to bind the party it represents to this document.

Agreed this 24<sup>th</sup> day of Sept., 2001.

By Will Miller

Title V.P. - Public & Regulatory Affairs

It is so ORDERED and Agreed this 28 day of Sep., 2001.

By Daniel Meer

DATE: 9/28/01

Daniel Meer  
Branch Chief, Superfund Division  
Region IX  
U.S. Environmental Protection Agency

EFFECTIVE DATE: Oct 4, 2001